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Supreme Court of the United States

OCTOBER TERM, 1959

No. ...893

MANHATTAN FRUIT EXPORT CORPORATION,

Petitioner,

against

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1959

MANHATTAN FRUIT EXPORT CORPORATION, Petitioner, *against* ROYAL NETHERLANDS STEAMSHIP COMPANY, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This petition is for a writ to review a judgment of the United States Court of Appeals for the Second Circuit entered November 9, 1959 (145a) reversing a judgment (84a) of the United States District Court for the Southern District of New York in favor of petitioner in an action for damages under the Carriage of Goods by Sea Act (U. S. Code, Title 46, Chap. 28, Secs. 1303-4) and breach of contract.

Opinions Below

The opinion of the District Court (70a-84a), is reported in *175 Fed. Supp. 771*, and that of the Court of Appeals (140a-144a) is reported in *271 Fed. 2nd 607*.

Rehearing was denied on February 9, 1960 (154a).

Jurisdiction

The judgment sought to be reviewed is dated November 9, 1960, and was entered on the same date.

The jurisdiction of this Court is invoked under the Judiciary Act, Title 28, Sec. 1254.

Questions Presented

(1) Is refrigerator temperature data, claimed to have been manually copied from destroyed original records, admissible in evidence over objection, under the Business Entries Act (U. S. Code, Title 28, Sec. 1732), when no witness who made either the original or copy testifies, and when no proof is offered that it was the regular course of business to make such copies at the time the temperatures were allegedly observed on the thermometer, or within a reasonable time thereafter, or even prior to the discovery that refrigerated cargo had been damaged?

(2) Where cargo required to be refrigerated has spoiled during the voyage may an ocean carrier sustain its statutory burden of proving its freedom from fault under the Carriage of Goods by Sea Act (U. S. Code, Title 46, Secs. 1303-4) and compliance with its contract in a bill of lading solely by the evidence described in Question No. 1?

(3) May a Court of Appeals reverse a judgment of a District Court which had weighed and rejected such described evidence and had found that the carrier had failed to sustain said statutory burden of proof, on the basis that the District Court finding was "clearly erroneous"?

(4) Where a bill of lading has been issued under the carriage of goods by Sea Act which states that the cargo shall be refrigerated within a given temperature range, is a carrier relieved of all other duties of care with respect to the cargo during the voyage?

Statutes and Rule Involved

U. S. Code, Title 46, Chap. 28, Vol. 9, page 7826 (Carriage of Goods by Sea Act) provides in relevant part as follows:

"Sec. 1300. Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

Sec. 1302. Subject to section 1306 of this title, under every contract of carriage by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

Sec. 1303(1). The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to— • • •

(c) Make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(8). Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect • • •."

Section 1304 of the above act provides in relevant part:

"• • •

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, • • • and to make the holds, refrigerating and cool

chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of section 1303 of this title. • • •

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from— • • •

(q) Any other cause (after reciting in subdivisions (a) through (p) various matters of force majeure, matters extraneous to the carrier's proper management of the ship, matters attributable to the shipper, etc.) arising without the actual fault and privity of the carrier and without the fault and neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Sec. 1305. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. • • •

Sec. 1306. Notwithstanding the provisions of sections 1303-1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, • • • or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods

carried by sea: Provided, that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document which shall be marked as such."

Any agreement so entered into shall have full legal effect: Provided, that this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as to reasonably justify a special agreement.

The Business Entries Act (Title 28 U.S.C., Sec. 1732, Vol. 6, page 5049) provides:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

Rule 52 (a) Rules of Civil Procedure for the United States District Courts reads in relevant part as follows:

(a) • • • "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

Statement

Petitioner, a wholesale dealer in fruits and vegetables, sued respondent, a carrier of goods by sea, for damages to a cargo of plums shipped from New York to La Guaira, Venezuela, as refrigerated cargo (70a).

The trial court found that petitioner had sustained its burden of showing no inherent vice in the shipment (73a-78a), i.e., that the plums were sound when shipped, and, if they had been properly cared for aboard, that they would have reached destination, after a twelve-day trip, in salable condition (78a-81a). The Court of Appeals accepted this finding, not finding it necessary to review it (141a).

The District Court found that the plums had spoiled en route and fixed the amount of the loss (76a-83a). Other fruit on the ship, and even in the same refrigerator, had spoiled and the shippers had been paid therefor (76a, 130a, 132a, 136a, 137a, P. ex. 24b). The Court of Appeals also accepted these findings (141a). It reversed the trial court's judgment, however, "because we think that the plaintiff (petitioner) did not prove that the defendant (respondent) failed to perform its contract" (141a). It did not consider whether the carrier had sustained its burden of proving that it had otherwise complied with its much broader obligations under the Carriage of Goods by Sea Act.

Thus it held that the carrier to sustain its burden of proving freedom from fault or neglect contributing to the loss, need show no more than that it refrigerated the cargo as required in the bill of lading.

This finding bringing about reversal, (and leaving the undisturbed finding of spoilage en route unaccounted for) was based on certain temperature charts purporting to reflect the temperature at two hour intervals during the voyage in the refrigerator where petitioner's plums were stored (141a-144a). No witness who made these secondary records, or who made the original entries, was produced.

Neither were the original entries on slips of paper produced. They had been destroyed (63a, 79a, 143a).

Thus these records were clearly hearsay and inadmissible unless they strictly complied with the Business Entries Act (U.S.C., Title 28, Sec. 1732). Clearly they did not do so, since there was no evidence that they were made contemporaneously or within a reasonable time.

Every two hour entry from October 2nd to October 13th, the time of discharge, (67a, Df.'s ex. F-1) was exactly the same, to wit, 3° centigrade*, within the bill of lading contract limits of 35° F to 40° or 41° F (45a).

The Court of Appeals held that mere compliance with this clause in the bill of lading completely discharged the respondent's responsibilities (141a), although the statute does not expressly, nor, in our view, by reasonable implication, so provide.

No testimony of any kind was offered as to when these secondary records were made—not even as to whether they were made prior to or after damages had been claimed for spoilage. There is no basis whatever for the Court of Appeals' statement that the Chief Officer, Vermeulen, prepared these statements. He never said so, expressly or impliedly (142a), and no one else testified on the subject. Who prepared them is a mystery. The Chief Officer simply produced them. The Chief Engineer, apparently in charge, had died before the trial, and his deposition had not been taken (62a, 63a, 79a).

The trial court had rejected as unreliable these temperature charts which petitioner had objected to as incompetent (78a-79a).

The basis for Federal jurisdiction in the trial court was diversity of citizenship, and the Carriage of Goods by Sea Act (U. S. Code, Title 28, Sec. 1331-2; Sec. 1333; Title 46, U. S. Code, Secs. 1303-4).

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* 0° centigrade = 32° fahrenheit. Each centigrade degree is 1/5 of a fahrenheit degree. Therefore 3° C = 37° F.

Reasons for Granting the Writ

The Court of Appeals decided important questions of federal law which have not been but should be settled by this Court (Questions 1, 2 & 4), decided an important question of federal law in conflict with decisions of this Court (Question 3), and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Question 3).

The Carriage of Goods by Sea Act (U. S. Code, Title 46, Chap. 28) throws the burden of proving freedom from fault during carriage on the carrier. The obvious reason is that the carrier is alone in a position to know the conditions existing during carriage (78a). There can be no exculpation merely by compliance with the bill of lading specification as to temperature range, assuming *arguendo* there was proof of such compliance, which we deny. Much more than mere compliance with bill of lading specifications is plainly necessary to sustain the carrier's burden of proving no fault or neglect contributory to the loss. cf. *Pettinos* v. *American Export Lines* (D.C.E.D. Pa., 1946), 68 F. S. 759, 761, aff'd 159 F. 2nd 247; *The Ensley City* (D. Ct. D. Md., 1947), 71 F. S. 444, aff'd 170 F. 2nd 25; *Standard Brands* v. *Brocklebank* (D.C.S.D. N. Y., 1948), 81 F. S. 670; *Spanish-American Skin Co.* v. *Ferngulf* (D.C.S.D. N. Y.), 143 F. S. 345, aff'd 242 F. 2nd 551; *Globe Solvents Co.* v. *California* (CCA, 1947), 167 F. 2nd 859, cert. den. 335 U. S. 844; *Remington Rand Inc.* v. *U. S.* (D.C.S.D. N. Y.), 98 F. S. 334; aff'd 202 F. 2nd 276; *Sanib Corp.* v. *United Fruit Co.* (D.C.S.D. N. Y., 1947), 74 F. S. 64; *Otis McAllister & Co.* v. *Skibs*, 260 F. 2nd 181, cert. den. 359 U. S. 915; *S. S. Asturias* (D. Ct., S.D. N.Y., 1941), 40 F. S. 168, 170; aff'd *Wessels* v. *Asturias* (CCA 2nd 1942), 126 F. 2nd 999. A proper method of stacking, proper ventilation, isolation from other harmful cargo, *inter alia*, must be shown. Large quantities of yeast and cheese had been stowed with the fruit (149a). Defendant's expert

admitted this was deleterious (119a-120a). No proof was offered that the one thermometer was correct, or that it was located to properly take the temperature of the fruit.

Yet the Court of Appeals rejected the finding of the District Court, which in a long and careful opinion had given due consideration to all these matters, and on the basis of incompetent, self-serving hearsay temperature data reversed the District Court, which had duly weighed and rejected this evidence.

If without producing witnesses, or even the records of original entry, and by merely producing secondary records, suspicious on their face, made by no one knows whom, or no one knows when, and not even shown to have been made prior to knowledge of the damage, or the claim therefor, the carrier can sustain its burden on the broad issue of no contributory fault or neglect, the statute is rendered wholly ineffectual to accomplish its plain purpose.

Tremendous quantities of refrigerated cargo leave the ports of the United States every day. It is highly important therefore that the shippers and carriers know what obligations are imposed on ocean carriers by the Carriage of Goods by Sea Act and what evidence will satisfy the burden of showing no fault or neglect contributing to a loss, which burden is imposed on carriers by the Act. Surely the requirements of the statutes involved should at the very least be substantially complied with.

Under the Business Entries Act such evidence is not even admissible unless it was the regular course of business to make such record or memorandum at the time of the occurrence or within a reasonable time thereafter. *U. S.* v. *Skolnick*, 149 Fed. Supp. 703, 706-7 (S.D.N.Y. 1957). There is a complete absence of proof in this respect.

Sub-paragraph (b) of Sec. 1732 authorizes the admission in evidence of an exact reproduction by photostatic

or similar means of an original record made in the regular course of business. What it authorizes emphasizes the non-admissibility of any other kind of copy whose accuracy cannot be determined. Indeed our data is admittedly not exact (142a).

But even assuming admissibility, for a Court of Appeals to rely on such insubstantial self-serving evidence to reverse as "clearly erroneous" a trial court's considered rejection thereof, is clearly improper. Even the point about the trial court's being in no better position to judge the veracity of the witness by his demeanor, since he (Vermeulen) testified on deposition (142a), is of no validity, since he did not make the records, but merely produced them.

It is fundamental that parties litigant are entitled to a trial of the issues of fact "not upon hearsay, but upon the testimony of persons having first-hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination." *U. S.* v. *International Harvester Co.*, 274 U. S. 693, 703.

Judge Leibell's comments on the temperature evidence are most apt (78a). The evidence admitted under the Business Entries Act must be inherently trustworthy (*Palmer* v. *Hoffman*, 318 U. S. 109), and this was clearly not.

The weight of such evidence is for the trial court. *Carpenter's Union* v. *Cisca Construction Co.* (C.C.A. 9, 1959), 266 Fed. 2nd 365, 370; *First National Bank of Colorado Springs* v. *McGuire* (C. A. Ind. 1950, 184 F. 2nd 620).

The findings of the District Court were not "clearly erroneous", even on the narrow issue of compliance with the temperature range requirement in the bill of lading (an issue to which the Court of Appeals improperly confined itself), much less on the true issue of sustaining the burden of proof of showing no fault or neglect contributing to the loss.

The following cases holding as indicated are representative of numerous holdings in support of our argument.

Where evidence would support a conclusion either way, but the trial court has decided to weigh it more heavily for defendants, such a choice between two permissible views of the weight of the evidence is not "clearly erroneous", *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338.

To similar effect are *Zeddies* v. *C.I.R.* (C. A. 7, 1959) 264 F. 2nd 120, cert. den. 360 U. S. 916 and *Shoso Nii* v. *Brownell* (C. A. Hawaii 1953), 206 F. 2nd 895.

Findings may not be set aside when they are in accord with a reasonable view of the facts. *U. S.* v. *Hill Lines* (C. A. Tex. 1949) 175 F. 2nd 770. That the trial court could have viewed the facts differently, or that the Court of Appeals might perhaps have done so if it had been the initial trier of fact, does not justify reversal. *Nee* v. *Linwood Securities Co.* (C. A. Mo., 1949), 174 Fed. 2nd 434.

The Court of Appeals can look only to the evidence most favorable to the District Court's findings and such reasonable inference as may be drawn therefrom. *Lewis Machine Co.* v. *Aztec Lines* (C. A. Ill., 1949) 172 Fed. 2nd 746. To justify a reversal the lower court's findings must be without adequate evidence to support them, or there must have been a misconception or misapplication of the law. *Hudspeth* v. *Esso Standard Oil Co.* (C. A. Ark. 1948) 170 F. 2nd 418. Findings of fact and judgment of trial court will not be set aside upon appeal unless there is no substantial support of them in the record. *Freese* v. *Jones* (C.C.A. Okl., 1946), 156 F. 2nd 454; *Richardson* v. *U. S.* (C.C.A. Ala. 1944), 145 F. 2nd 764; *Andrew Jergens Co.* v. *Conner* (C.C.A. Ohio, 1942), 125 F. 2nd 686.

There should be no reversal simply because the appellate court might give the facts another construction, or resolve the ambiguities differently and thus find a more

sinister cast to defendant's actions than the lower court. *U. S.* v. *National Association of Real Estate Bds,* 339 U. S. 485.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

THOMAS TURNER COOKE,
Attorney for Petitioner.

EDWARD R. LOOMIE,
of Counsel.

Opinion.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

This opinion appears at pages 70a-84a of the gray-covered Appendix, ten copies of which have been filed, and in 175 Fed. Supp. 771.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13—October Term, 1959.

(Argued October 9, 1959 Decided November 9, 1959.)

Docket No. 25503

MANHATTAN FRUIT EXPORT CORPORATION

Appellee,

—v.—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellant.

Before:

HAND, WATERMAN and FRIENDLY,

Circuit Judges.

On appeal from a judgment of the District Court for the Southern District of New York, Leibell, *J.* presiding, holding the defendant liable for damage to a cargo of 1000 cases of plums shipped at Brooklyn, New York and discharged at La Guaira, Venezuela, in September 1953.

HERBERT M. LORD, *for the appellant.*

EDWARD R. LOOMIE, *for the appellee.*

HAND, *Circuit Judge:*

The defendant appeals from a judgment for damages to 1000 cases of plums delivered to the defendant's motorship, "Helena," at Brooklyn on September 30, 1953, and discharged at La Guaira, Venezuela, on October 13th. The complaint alleged that while in the defendant's custody it failed "to exercise due diligence to make the holds, refrigerating and cooling chambers and all other parts of the ship * * * safe" for the carriage of the fruit, and the only issue litigated was the failure to perform this undertaking along with the related issue of the condition of the plums when delivered.

The plums were shipped under two bills of lading on which were stamped two clauses: (1) "refrigerated stowage 35/40," and (2) "*Refrigerated cargo:* to be carried in refrigerating compartments in which the air temperature is to be maintained between about 35° and 41° Fahrenheit." The plaintiff introduced testimony that the plums were in good condition when delivered, and that they had begun to decay upon their discharge at La Guaira; and Judge Leibell found that they were sound when shipped, had been spoiled en route and fixed the amount of the loss. We find it unnecessary to review these findings and we shall accept them for the purposes of this appeal because we think that the plaintiff did not prove that the defendant failed to perform its contract. Its obligation was limited by the clauses in the bills of lading; that is to say, it performed its obligation if the temperature in the compartment where he plums were stowed was kept "between about 35° and 41°." In view of the first quoted clause in the bills of lading we

shall read the maximum as 40°, and not 41°. The plums were stowed in what was known as the starboard 'tween-decks "reefer," a compartment so built as to exclude the entrance of air, and furnished with cooling coils which, when properly operated, would keep the temperature in the "reefer" at below 40° Fahrenheit. The defendant argues that it so conclusively proved that this was done that it was "clearly erroneous" for the judge to find that it was not. This it sought to establish by Exs. F-1 and F-2 which were charts, purporting to record the temperature in the "reefer" every two hours between September 30 and October 13. The practice was for someone of the ship's company (whether a sailor or an officer does not appear), to look at a thermometer placed in the ceiling of the "reefer," thirty feet above the 'tweendeck, and to record the readings upon pieces of paper which he then delivered either directly to the chief mate, Vermeulen, or to some other person who turned them over to that officer. Vermeulen then prepared the charts (Exs. F-1 and F-2), from these "rough notes," which he threw away. It may be assumed from a letter of the defendant that in making the charts the temperatures recorded were not exactly those taken down on the "rough notes" but "only the average temperature" if the difference between it and that observed was only half a degree, Centigrade. This we understand to mean that, as long as the actual temperature observed was not above five degrees Centigrade (41° Fahrenheit) the entries on the charts might vary half a degree, Centigrade. All entries from 6 a.m. on October 1 to 8 a.m. October 13, were 40.1° Fahrenheit or less and therefore complied with the bills of lading. We can see no reason for supposing that they were fabricated for the purpose of excusing the ship. Possibly we might have some doubt about reversing the trier's refusal to accept the charts, if the testimony had been taken in court; but so far as concerns this part of the record, it was all by

deposition so that we are in as good a position as the judge to decide their dependability. Not only would their fraudulent concoction be an altogether gratuitous imputation; but similar charts for the neighboring "reefer," No. III, frankly disclosed a continuous failure to maintain the stipulated temperature, and the defendant admitted liability for the damage so caused. It is most improbable that, having thus conceded its fault throughout the same period as to one "reefer," it should have palmed off a fictitious record for the other. There can of course be no doubt as to the competency under § 1732, of Title 28, U. S. Code, of documents prepared as these were.

Judge Leibell thought the charts unreliable because there was "no proof as to when the temperature record (Ex. F-1) was made, whether the entries were all made at the same time or how soon they were made after the temperature record was put on the first or rough paper. But this much appears, that, if the temperature record was made subject to the above instructions then it recorded something other than what the thermometer indicated and further the temperature record itself (Ex. F-1) shows that those instructions were not followed on September 29th and 30th, or on October 1st and 2nd." We cannot understand why it throws any doubt upon the reliability of the charts that the entries were made at different times, or how soon that was after the "rough notes" were made. The charts would be equally truthful, whenever the figures were transcribed from the original slips; indeed the slips themselves would have been a nuisance, if they had been kept in their original form and their contents had not been put into a readily available form. Nor do we understand in what respect the "instructions" were not followed, or why the record was of "something other than the thermometer indicated," unless it be that fractions of less than one degree, Centigrade, were not recorded. None of

the plaintiff's plums were stowed until September 30th, and, while it is true that on that day and October 1st, though not on October 2nd, the temperatures did rise above 41°, that does not show that the "instructions" were not "followed," because the periods when this was true were when the plums or other cargo in No. IV were being stowed and when the door of the "reefer" had to be kept open. That was inevitable, and shippers were certainly charged with notice that it would occur. Finally the plaintiff argues that Vermeulen's testimony supports its position, because although in his deposition he denied that he saw any damage to the plums in No. IV at the outturn in La Guaira, in correspondence between the defendant's New York and Amsterdam officers it was stated "that several packages were inspected by him at La Guaira and he had noted that in cases with rotten plums he had also found some which were hard and green." This statement does not show where the "packages" had been stowed that had contained the "rotten plums," and it is entirely consistent with their having been stowed in "reefer," No. III, where there was a complete breakdown in refrigeration. For the foregoing reasons we feel obliged to hold that it was "clearly erroneous to conclude that the charts Exs. F-1 and F-2, were not reliable, and that they discharged the burden of proof that § 1304(2)(q) of Title 46 imposed upon the defendant.

Judgment reversed; complaint dismissed.

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OFFICE-SUPREME COURT, U.S.
FILED
MAY 20 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 893

MANHATTAN FRUIT EXPORT CORPORATION,
Petitioner,

against

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1959

No. 893

MANHATTAN FRUIT EXPORT CORPORATION,
Petitioner,

against

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court is reported at 175 F. Supp. 771 and that of the Court of Appeals at 271 F. 2d 607.

Questions Presented

Questions 1, 2 and 4 set forth on page 2 of the petition do not arise in this case. Question 3 poses a narrow issue of fact of consequence only to the litigants herein. The Court of Appeals decided question 3 correctly.

Statement

Manhattan Fruit Export Corporation, a shipper of plums on respondent's vessel, petitions for review on writ of certiorari of the unanimous decision of the Court of Appeals which rejected as clearly erroneous the District Court's finding of fact that respondent had failed properly to refrigerate the plums, and reversed the District Court judgment which had awarded petitioner damages of $3,796.92.

Argument

Question 1 posed by the petition asks whether respondent's records (Df. Exs. F-1, F-2, A. 67, 69, R. 577-579),* recording bi-hourly throughout the voyage temperatures maintained within the chamber where the plums were stowed, are "admissible in evidence over objection" as business records under 28 U. S. C. § 1732.

Petitioner did not interpose any objection to the admissibility of these records in the Courts below and, we submit, may not now seek review on this basis. *United States* v. *Fillebrown*, 32 U. S. 28, 47; *Schuchardt* v. *Allens*, 68 U. S. 359, 367.

But they were properly admitted. Chief Mate Vermeulen testified by deposition that it was the practice of the vessel to keep temperature records during this voyage and others (R. 577); that such records were "always" made (R. 577); and identified the records which petitioner now claims were inadmissible as the "official records" of the temperatures experienced in the reefer compartment in which these plums were stowed (R. 577-579). He identified the signatures of the master and chief engineer appearing thereon (R. 578). Plaintiff's Exhibit 33 (A. 62-63, R. 191) explains the regular procedure pursuant to which these records were prepared from contemporaneous rough sheets upon which the temperatures in the chamber were taken down every two hours, with the rough sheets then being discarded.

Thus the records which were produced are not "claimed to have been manually copied from destroyed original records". They are the records.

As the Court of Appeals pointed out by way of dictum: "There can of course be no doubt as to the competency

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* R. refers to page of the record certified to the Court of Appeals by the District Court. A. refers to page of the printed appendix to defendant-appellant's brief in the Court of Appeals.

under § 1732, Title 28, U. S. Code, of documents prepared as these were." (271 F. 2d 607, 608, 609.)

Questions 2 and 4 both ask whether temperature records alone are sufficient proof that a carrier has been free of neglect in respect of refrigerator cargo.

At the trial respondent introduced proof that the plums were stowed in the No. 4 starboard 'tween-deck reefer (daily loading list, Df. Exs. C-1, C-2, R. 205, 570; dock receipt, Df. Ex. D, R. 206, 571; and stowage plan, Df. Ex. E, R. 207, 574) which has a tonnage capacity of about 60 tons (A. 31), but on this voyage only contained about 27 tons of cargo, leaving ample space for air circulation (A. 31). The boxes of plums were stowed brick fashion, leaving a space between the ends of the boxes for air circulation (A. 31). Small dunnage was placed between the tiers for the same purpose (A. 31-32). This was proper stowage (A. 33). There was further testimony that the No. 4 reefer was cooled by coils through which freon gas was circulated (A. 35), was equipped with ventilating fans which circulated the air (A. 35), and that the air in the box was replaced twice daily by an exhaust fan (A. 36). A plan of the compartment was produced in evidence (Df. Ex. K, R. 253), showing the location of the thermometer bulb from which the temperature readings were taken to be on the ceiling of the chamber about four feet from the forward bulkhead and thirty feet above the floor of the box (R. 249). This was a proper location (R. 250).

All of this was in addition to the temperature logs. Patently, therefore, the question of sufficiency of the temperature charts alone is not presented on this record.

By question 3 petitioner asks this Court to grant review to decide whether the fact-findings of the District Court as to refrigeration are so clearly erroneous as to warrant reversal by the Court of Appeals.

The District Court condemned respondent because the temperature records showed that temperatures in excess of 41° F. existed in the reefer on September 29, 1953 (A. 79). Yet this was one day before the plums were delivered to respondent (R. 82).

The District Court found that the temperature records showed 41° F. to have been exceeded in the reefer on October 2, 1953 (A. 79). But the highest temperature recorded on that day was 3½° C., which is slightly under 39° F.

The District Court ignored the inference of reliability of the temperature records for No. 4 reefer stemming from the fact that identical records for No. 3 (Pl. Ex. 35, A. 65, R. 191) accurately reflected the higher and improper temperatures there maintained (A. 79).

None of the aforesaid findings of fact of the District Court was supported by any evidence. The evidence against them was uncontradicted and unimpeached. Accordingly, the Court of Appeals found them clearly erroneous and reversed. In so doing that Court did not raise "an important question of Federal law in conflict with the decisions of this Court", as stated in the petition.

CONCLUSION

For the foregoing reasons we submit that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

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